IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-39

JOSEPH A. ZRENCHIK, ET AL.,
Appellants,

v.

PEOPLES COMMUNITY HOSPITAL AUTHORITY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

MOTION TO DISMISS

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The Appellee moves the Court to dismiss the appeal herein on the ground that it is manifest that three questions presented were not timely presented in the Michigan State courts and the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATE "STATUTE" INVOLVED AND THE NATURE OF THE CASE.

A. The State "Statute".

This appeal questions the validity of a policy resolution, adopted by the Board of Directors of Appellee on October 17, 1957, which provides that patients treated in hospitals operated by PEOPLES COMMUNITY HOSPITAL AUTHORITY who are not residents of one of its 24 constituent communities will be subject to a 20% surcharge.

Appellee's authority to adopt the policy resolution originates from 1945 PA 47 [MCLA 331.1 et seq.; MSA 5.2456(1) et seq.], the legislative enactment under which the Appellee is organized. This Act provides that two or more cities, villages or townships may join to form, maintain and operate one or more community hospitals. The resulting Hospital Authority has been determined to be a State agency, *Ecorse* v *Peoples Community Hospital Authority*, 336 Mich 490, 58 NW 2d 159 (1953).

Section 4 [MCLA 331.4; MSA 5.2456(4)] of Act 47 authorizes the legislative bodies of the cities, villages or townships belonging to the Hospital Authority to raise annually by a tax to be levied on the taxable property within their respective jurisdictions a sum of money to be used for community hospitals in an amount not to exceed 4/10 of 1 mill on each dollar of assessed valuation.

Section 2 [MCLA 331.2; MSA 5.2456(2)] of Act 47, expressly authorizes the Hospital Authority to contract with any individual, firm, or corporation for the furnishing of hospital care to persons at the private

expense of the individual, firm or corporation. Implicit in such authorization is the power to set rates in such a contract.

Section 8(i) [MCLA 331.8i; MSA 5.2456(8i)] of Act 47 mandates hospital rates for services to be established so as to provide for payment of expenses of administration, operation and maintenance and payment of principal and interest on bonds issued and outstanding.

The validity of 1945 PA 47 and the organization of PEOPLES COMMUNITY HOSPITAL AUTHORITY thereunder have been upheld by the Michigan Supreme Court; *Bullinger* v *Gremore*, 343 Mich 516, 72 NW 2d 777 (1955); *Peoples Community Hospital Authority* v *City of Ecorse*, 342 Mich 510, 70 NW 2d 749 (1955); *Ecorse* v *Peoples Community Hospital Authority, supra.*

The surcharge set by the Board of Directors of Appellee was done so pursuant to 1945 PA 47. The policy resolution was adopted as a rate setting measure to equalize or off-set the 4/10 mill paid by residents of participating communities. Patients residing in a community which is not a part of an "Authority" do not pay the additional millage.

There is no provision in Act 47 and no resolution or policy of Appellee Authority which denies medical care to any person.

B. Proceedings Below.

Appellant, in attempting to recover a surcharge paid to PEOPLES COMMUNITY HOSPITAL AUTHORITY (for medical services rendered) filed suit and attacked the charge on two grounds: (Appellant's Complaint, pp 2,3).

(1) that a surcharge of non-residents was an arbitrary classification depriving said persons of equal protection of the laws in violation of the Constitution of the United States and of the State of Michigan;

(2) that the statute under which the Authority was organized does not specifically authorize the surcharge.

Appellant and Appellee each filed a Motion for Summary Judgment with supporting briefs. After oral arguments and consideration by the trial court an Opinion was issued granting the Appellee's Motion for Summary Judgment.

Appellant then filed a Motion for Rehearing stating (Appellant's Motion for Rehearing, p 2):

(1) the Court did not consider the issue that the Appellee had no statutory authority to levy the surcharge;

(2) the Court did not consider the issue that no procedure was established by the Appellee to determine whether or not patients owned taxable property within the jurisdiction served by the defendant Authority; [this issue was not pleaded and Appellant admits he owns no taxable property in any member community];

(3) that the Court erred in determining that the levy of the surcharge did not constitute a denial of equal protection of the laws.

The trial court carefully considered and rejected all issues raised by Appellant on the rehearing.

Appellant appealed to the Michigan Court of Appeals. On January 10, 1978, the Court of Appeals rendered an opinion upholding the surcharge on non-residents, stating that there was a rational basis for the surcharge and that the distinction based on residency was valid. More specifically, the Court of Appeals stated:

> "There is a substantial relationship between the resident/non-resident distinction and the differing rates. Plaintiff's Complaint only challenged the validity of a surcharge based on residency. But residency requirements, standing alone, are not a denial of Equal Protection. See *Vlandis* v *Kline*, 412 US 441; 93 Sup. Ct. 2230; 37 Law ed 2d 63 (1973). Plaintiff's belated attempt to expand the challenge comes too late."

[Note: In his jurisdictional statement (p. 5), Appellant failed to quote or recognize the above quoted last sentence of the Court of Appeals' opinion].

Appellant sought leave to appeal to the Michigan Supreme Court, contending that the surcharge imposed on non-resident patients treated and cared for at any one of the hospitals operated by PEOPLES COMMUNITY HOSPITAL AUTHORITY was a violation of the Equal Protection Clause. Leave to appeal was denied by the Michigan Supreme Court on April 5, 1978.

II.

ARGUMENT

A. QUESTIONS NUMBER ONE AND FOUR PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE OF IMPROPER PRESENTATION OF THESE QUESTIONS IN THE STATE COURT.

A State procedural rule which forbids the raising of federal questions in late stages of the case, or by any other than prescribed methods, has been recognized as a valid exercise of State power. *William* v *Georgia*, 349 US 375, 382-3 (1954). A litigant must follow the State court procedure in raising federal questions. Failure to do so may prove fatal in the United States Supreme Court. *In re Lamkin*, 355 US 59 (1957); *Ferguson* v *Georgia*, 365 US 570, 572 (1961).

Where a reasonable state procedural requirement has not been observed, this Court has decreed it will decline jurisdiction where the highest State Court expressly refuses to decide the federal question for procedural reasons. *Penn Railroad Company* v *Illinois Brick Company*, 297 US 447, 462-3 (1935).

In the case at bar, Appellant's Complaint pleaded:

> "That charging said surcharge of persons who are not residents of the communities constituting the Defendant is an arbitrary classification depriving said persons of equal protection of the laws in violation of the Constitution of the United States and Michigan."

This pleading raises a question of the validity of the resident/non-resident distinction with respect to the surcharge, and nothing more.

Question number two presented in the Jurisdictional Statement was not pleaded in the Complaint. The claim that medical care is a fundamental interest was first alluded to in Appellant's brief filed in support of his Motion for Summary Judgment. It was not advanced in his Motion for Rehearing and Appellant did not raise it in his reasons and grounds for appeal filed with the Michigan Court of Appeals.

Question number four presented in the Jurisdictional Statement was not pleaded in the Complaint. It was not briefed or raised in Appellant's Motion for Summary Judgment. The trial judge, in ruling on the Motions for Summary Judgment, stated that there was a rational basis for the surcharge predicated upon non-residency so long as the non-resident does not own property within a participating community.

The trial judge then, by way of dicta, added:

> "However, if a non-resident does own property within the area and is a property taxpayer, a question may then arise whether the subject classification treats alike all persons of the same class. The Plaintiff here, however, has not claimed that he is a non-resident owner of property within one of the communities of the Hospital Authority that would be subject to millage tax. Accordingly, whether all persons of the same class of non-residents are affected alike from a constitutional standpoint need not be decided by this court".

This comment by the trial judge triggered Appellant's contention that he should be permitted to represent non-resident property owners who have paid the surcharge. There is no allegation or factual pleading that any non-resident property owners paid any surcharge.

The Michigan Appellate Courts will not consider a claim of deprivation of equal protection of the laws (or other constitutional issues) where no facts have been pleaded to support such claim. *Wayne County* v *State Department of Social Welfare*, 343 Mich 475, 480, 72 NW 2d 200 (1955); (wherein the Michigan Supreme Court refused to consider the claim of deprivation of equal protection of laws for lack of pleadings to support such); *Frigid Food Products, Inc.* v *City of Detroit*, 31 Mich App 402, 405, 187 NW 2d 916 (1971), (wherein the plaintiff tried to challenge the constitutionality of a Michigan statute for the first time at pre-trial conference over objections by the defendant. The Michigan Appellate Court refused to entertain the constitutional questions which had not been raised in the pleadings and had been withdrawn by plaintiff at pre-trial due to the defendant's objections to tardiness of plaintiff's action). See also *Falk* v *Civil Service Commission of Macomb County*, 57 Mich App 134, 137, 225 NW 2d 713, leave to appeal denied, 394 Mich 819 (1975).

The Michigan Court of Appeals in the present case refused to address any issue other than the issue of the validity of the resident/non-resident distinction with respect to the surcharge. It expressly stated that all attempts by Appellant to expand that issue "comes too late" (page 2 of Court of Appeals' Opinion). The Michigan Supreme Court agreed with this opinion by refusing to grant leave to appeal.

In the Complaint, Appellant pleaded only that he was a non-resident who was assessed a surcharge because of that status. Regarding medical care as a fundamental right, Appellant never pleaded facts to show that he or any other person had been denied medical care. With respect to standing to represent non-resident property owners, he never pleaded facts establishing their existence as a group and more importantly, he never qualified himself as one belonging to that group.

Questions one and four of Appellant's Jurisdictional Statement have been decided on adequate non-federal grounds — failure to follow reasonable state procedural grounds. Therefore, this Court should decline jurisdiction to review these issues.

Further, Appellant, in his Jurisdictional Statement, has made no effort to specify, as required by the Supreme Court Rule 15(1)(d), ". . . . the stage in the proceedings in the court of first instance, and in the appellate court at which, and in the manner in which the federal questions sought to be reviewed were raised, the method of raising them . . . and the way in which they were passed upon by the court."

B. QUESTION THREE PRESENTED IN APPELLANT'S JURISDICTIONAL STATEMENT SHOULD NOT BE CONSIDERED BY THIS COURT BECAUE IT WAS NEVER RAISED IN THE STATE COURTS BELOW.

This Court on several occasions has declined jurisdiction to review a federal question which has been raised for the first time in the notice of appeal to the United States Supreme Court in the Jurisdictional Statement filed with the Court. These papers are not

part of the record of state court proceedings, and it is that record which must affirmatively show a raising of the federal issue. *White River Lumber Co.* v. *Arkansas*, 279 US 692, 700 (1928); *Whitney* v. *California* 274 US 357, 362-3 (1926); *Raley* v. *Ohio*, 360 US 423, 434-6 (1959); *Cardinale* v *Louisiana*, 394 US 437, 438 (1969).

In the present case, Appellant never raised the issue of Due Process in the State courts. Again, Appellant has not specified in his Jurisdictional Statement the stage in the proceedings in the court of first instance, and in the Appellate Court at which the alleged federal questions were raised and passed upon as required by the Supreme Court Rule 15(1)(d).

C. QUESTION NUMBER TWO OF APPELLANT'S JURISDICTIONAL STATEMENT REGARDING THE RESIDENT/NON-RESIDENT CLASSIFICATION AS BEING ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DISCUSSED BY THIS COURT.

Appellant in his Complaint raised the validity of charging non-residents of participating communities a surcharge, while residents of such communities are not so charged. Thus, the equal protection question he raised is whether residency requirements are arbitrary and discriminatory in determining who pays the surcharge. This is the thrust of question number two in his Jurisdictional Statement.

In discussing the equal protection clause question, some benchmarks should be set forth. The rights

protected by the Michigan Constitution are the same as those protected by the 14th Amendment to the Federal Constitution, *Fox* v. *Michigan Employment Security Commission*, 379 Mich 579, 588, 153 NW 2d 644 (1967). The United States Supreme Court clearly set forth the rules applicable to equal protection cases in *McGowan* v. *Maryland*, 366 US 420 (1961) where at pp. 425, 426 it said:

> "The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A Statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (Citing cases)."

In applying the Equal Protection Clause of the United States Constitution, the Supreme Court has consistently recognized that the 14th Amendment does not deny to states the power to treat different classes of persons in different ways. Classification must be reasonable, not arbitrary and must rest upon some ground of difference having fair and substantial relation to the object of legislation, so that all persons similarly circumstanced shall be treated alike. *Reed* v. *Reed*, 404 US 71 (1971).

Appellant has not attacked the Appellee's method of determining residency as unreasonable. His claim is that the mere classification of resident/non-resident itself impinges on the Equal Protection Clause, a theory backed by no statutory or case law authority.

This Court has stated that residency requirements, standing alone, do not violate the Equal Protection Clause of the United States. In *Vlandis* v. *Kline*, 412 US 441, 453-4 (1973), the Court stated, with respect to higher college tuition for non-resident students:

> "We fully recognize that a state has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such institutions on a preferential tuition basis."

The case at bar is quite analogous to the preferential tuition situation in *Vlandis, supra*. Appellee, PEOPLES COMMUNITY HOSPITAL AUTHORITY, has been organized pursuant to state statute. There are now 24 member communities. It is the property taxes of the residents of these communities that help support the operation of its hospitals and the high quality of medical care made available to its communities. Appellee's position is supported by the assessment of the issue made by the Michigan Attorney General and adopted by the Michigan Court of Appeals. (Appellant's Appendix B, pp 6a, 7a):

> "The rational basis for surcharging non-resident patients can be found in 1945 PA 47, supra, § 4 and § 7. These Sections authorize

> cities and townships and villages composing the hospital authorities to levy taxes on their property to fund the construction and operation of the Hospital Authority. Non-resident patients are not subject to these taxes. Thus, the surcharge requires non-resident patients to pay an amount which more closely approximates the true cost of services. To provide service at the same rate to both residents and non-residents would constitute a subsidy for non-residents at the expense of the residents." OAG 5105, October 5, 1976.

The Michigan Trial Court, Court of Appeals, and Supreme Court have all agreed that the rational basis for the resident/non-resident distinction exists. The classification is not arbitrary or invidious. *Avery* v. *Midland County, Texas*, 390 US 474 (1968). In an analogous situation in *Vlandis, supra*, this Court has agreed that the state has a legitimate interest in classifying students into resident/non-resident groups for purposes of charging higher tuition to the latter group.

Therefore, the Supreme Court having recently addressed this issue and having upheld the resident/non-resident distinction, there remains no substantial fundamental question to be reviewed by this Court.

CONCLUSION

WHEREFORE, Appellee respectfully submits that questions one, three and four presented in Appellant's Jurisdictional Statement were improperly presented in the Michigan State Court below, and that question number two is so unsubstantial as not to need further argument. These four questions being the only ones on which this cause depends, Appellee respectfully moves this Court to dismiss this appeal.

Respectfully submitted,

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